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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CITY OF SEATTLE, ET AL.,

Petitioners,

v.

PAUL A. BASCOMB, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

By: David Allen
Counsel of Record

Todd Maybrown
Richard Hansen
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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. STATEMENT OF FACTS 1

A. FACTUAL BACKGROUND 1

1. The Shooting of Erdman Bascomb 1

2. Petitioner Fitzsimons' Policy of Inaction 7

a. The Shooting of William Tucker 11

b. Letter to the Seattle City Council 12

c. Seattle Times News Article 14

d. KIRO TV Videotape 16

e. Pillon Letter of February 9, 1988 18

B. PROCEDURAL HISTORY 22

III. SUMMARY OF ARGUMENT 25

IV. ARGUMENT 27

A. BECAUSE DISPUTED FACTUAL ISSUES EXISTED, THE NINTH CIRCUIT PROPERLY DISMISSED PETITIONERS' INTERLOCUTORY APPEAL 27

B. THE DISTRICT COURT CORRECTLY DENIED PETITIONERS' IMMUNITY CLAIMS 34

1. The officers violated clearly established rights 35

2. The District Court properly concluded that the officers were not immune 44

C. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THESE INTERLOCUTORY ORDERS 51

V. CONCLUSION 53

TABLE OF AUTHORITIES

Cases — Page

Federal Cases

American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372, 13 S.Ct. 758, 37 L.Ed.2d 486 (1893) 51

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 28

Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) 47

Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992) 38

Cartier v. Lussier, 955 F.2d 841 (2d Cir. 1992) 30

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) 27, 28

Craft v. Wipf, 810 F.2d 170 (8th Cir. 1987) 31

Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991) cert. denied, ___ U.S. ___, 113 S.Ct. 62, 121 L.Ed.2d 29 (1992) 31

Curnow v. Ridgecrest Police,
952 F.2d 321 (9th Cir. 1991)
cert. denied, ___ U.S. ___,
113 S.Ct. 460, 121 L.Ed.2d 369
(1992) 36, 44

Davis v. Little, 851 F.2d 605
(2d Cir. 1988) 37

Davis v. Scherer, 468 U.S. 183,
104 S.Ct. 3012, 82 L.Ed.2d 919
(1984) 34

DiMarco v. Rome Hospital,
952 F.2d 661 (2d Cir. 1992) 30

Elliot v. Thomas, 937 F.2d 338
(7th Cir. 1991), cert. denied,
___ U.S. ___, 112 S.Ct. 973,
117 L.Ed.2d 138 (1992)
30, 31, 32, 43, 44

Fargo v. City of San Juan Bautista,
857 F.2d 638, 641 (9th Cir. 1988) 37

Graham v. Connor, 490 U.S. 386,
109 S.Ct. 54, 102 L.Ed.2d 32
(1989) 38

Hamilton-Brown Shoe Co. v.
Wolf Bros. & Co., 240 U.S. 251,
36 S.Ct. 269, 60 L.Ed.2d 629
(1916) 51

Harlow v. Fitzgerald, 457 U.S. 800,
102 S.Ct. 2727, 73 L.Ed.2d 396
(1982) 28, 34

Hopkins v. Andaya, 958 F.2d 881
(9th Cir. 1992) 50

Howell v. Evans, 922 F.2d 712
(11th Cir. 1991) 31

Hunter v. Bryant, 502 U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) 33, 49

Hurlman v. Rice, 927 F.2d 74 (2d Cir. 1991) 30

Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991) 30

Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963) 38, 39

Lion Boulos v. Wilson, 834 F.2d 504 (5th Cir. 1987) 30

Miller v. U.S., 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958) 39

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) 27, 28, 29, 32, 43

Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) 38

Peppers v. Coates, 887 F.2d 1493 (11th Cir. 1989) 31

Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed.2d 77 (1955) 52

Reed v. Hoy, 891 F.2d 1421 (9th Cir. 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 2887, 115 L.Ed.2d 1053 (1990) 37

Rivera v. United States, 928 F.2d 592 (2d Cir. 1991) 39, 42

Schrob v. Catterson, 967 F.2d 929 (3d Cir. 1992) 30, 44

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987), cert. denied, 484 U.S. 936, 108 S.Ct. 311, 98 L.Ed.2d 269 (1988) 37

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) 35, 36, 37

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 38

United States v. Bustamante-Gamez, 88 F.2d 4 (9th Cir. 1973), cert. denied, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974) 39

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed.2d 1282 (1949) 52

U.S. v. Mapp, 476 F.2d 67 (2d Cir. 1973) 39

Vaughan v. Ricketts, 950 F.2d 1464 (9th Cir. 1991) 53

Velasquez v. Senko, 813 F.2d 1509 (9th Cir. 1987) 29, 30, 33, 44

Washington v. Fishing Vessel Assn., 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) 52

Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989) 31, 37

Washington State Cases

State v. Coyle, 95 Wash. 2d 1, 621 P.2d 1256 (1980) 39, 41

State v. Edwards, 20 Wash. App. 648, 581 P.2d 154 (1978) 39, 41

Constitutional Provisions

United States Constitution
Fourth Amendment 36, 38, 41
Fourteenth Amendment 41

Statutes, Court Rules & Miscellaneous

18 U.S.C. § 3109 41
42 U.S.C. § 1983 22, 42

Justice William Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230 (1983) 52

RCW 10.31.040 41

I. INTRODUCTION

The respondents, Paul A. Bascomb, Frank Bascomb, Sr. and Flora O. Bascomb, request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's order in this case.

II. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

1. The Shooting of Erdman Bascomb

During the afternoon of February 16, 1988, a Seattle Police Department ("SPD") informant allegedly purchased a small quantity of cocaine from a "black male in his mid twenties"[1] at the apartment located at 3610 36th Ave. S, Apartment C, in Seattle, Washington ("Apartment"). See CR 61 (Inq. Tr. Vol. II, 17-27). The following day, SPD obtained a warrant to search the Apartment. At approximately

---

[1] This was not Erdman Bascomb, for Erdman was forty-one years of age at the time of this incident.

11:45 p.m., more than twelve hours after obtaining the warrant, and over 30 hours after the alleged purchase of narcotics, officers of the SPD South Precinct Anti-Crime Team ("ACT II") travelled to the Apartment to execute the warrant. Upon reaching the threshold of the Apartment, Officers Ron Murray and Roger Rusness broke down that door with a battering ram. Petitioner Officer Robert Lisoski immediately entered the Apartment with his gun drawn and saw a person, Erdman Bascomb, lying on a couch in the living room watching television. Erdman, an Army veteran who was working as a longshoreman, was unarmed and posed no threat to the police officers. Nevertheless, less than one second after entry, Lisoski shot and killed Erdman Bascomb.

Three individuals who were in an apartment next door to the Bascomb Apartment heard the police break down the

door and enter the Apartment. They have stated that the police did not knock, announce their presence, request admission or wait any period of time before breaking down the door. According to these witnesses, the police broke down the door without any warning or opportunity for Erdman to answer. CR 59 (Wilson Statement at para. 6; Muldrow Statement at para. 3); Johnson Statement at paras. 6 and 8); CR 61 (Inq. Tr. Vol. III, 107, 130, 150-152, Vol. IV, 42-44; Vol. V, 95-96).

While the police officers and two newspaper employees who were accompanying the officers on the raid claim that the police knocked and announced, by their account the wait was at most a few seconds. Murray, one of the officers holding the battering ram, stated that he waited only one to two seconds before breaking open the door. See CR 61 (Inq. Tr. Vol. II, 155). All police officers

agreed that there were no "exigent circumstances" and that they possessed no objective information prior to the raid suggesting that the occupants would be armed or dangerous, or that the occupants would try to escape or destroy evidence. The State's informant provided no information that there might be firearms within the Apartment. See CR 61 (Inq. Tr. Vol. II, 12). No one heard any sound from inside the Apartment after the police claim they knocked and announced. See CR 61 (Inq. Tr. Vol. III, 22). Neither Lisoski, nor any other officers, all of whom stood listening for the sounds of running, screaming, flushing toilets or other indications that the occupants were trying to escape or destroy evidence, heard any noise within the Apartment. See CR 61 (Inq. Tr. Vol. III, 22-23). Lisoski knew of no reason why the officers could not have knocked and announced a second

time, or waited longer, before breaking down the door. Furthermore, Lisoski conceded that it is quite advantageous to police officers if the occupants answer the door. See CR 61 (Inq. Tr. Vol. III, 34-35).

After the officers broke down the door with a battering ram, Lisoski took approximately two steps into the Apartment and claims that he saw movement and what looked like an arm extending out from a person's body. See CR 61 (Inq. Tr. Vol. III, 174). Lisoski immediately fired his weapon and killed Erdman Bascomb. See CR 61 (Inq. Tr. Vol. III, 175). Lisoski provided no warning before shooting at Erdman. He never stated "drop it" or similar words which would have avoided the shooting. See Lisoski Dep. at 98.

The Apartment was dark when Lisoski went through the door. Lisoski, who was not carrying a flashlight, could not

identify any features of the person he shot. He could not tell whether the person was male or female, nor could he distinguish any object in the person's hand. See Lisoski Dep. at 101. Erdman was unarmed and helpless; he posed no threat to these officers.[2]

Lisoski claims that Erdman was moving off the couch and that his right leg was off of the couch, as if he were going to stand, at the time of the shooting. This

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[2] Petitioners note that the inquest jury concluded that Lisoski's actions were reasonable. This is of no legal significance. As explained by the district court, the Bascombs had little opportunity to participate in the inquest proceedings. They could not call witnesses, they could not argue their case to the jury, requested instructions regarding the requirements of the knock and wait rule were not given and there was no right of appeal from the inquest jury's advisory verdict. See Petition App. 12-13; CR 86 (Allen Affidavit re: Inquest). Furthermore, some jurors were quite troubled by the conduct of these police officers. See id. Petitioners do not challenge the district court's holding regarding this issue.

claim was rebutted by a police officer and newspaper reporter, both of whom entered the Apartment immediately after the shooting and observed Erdman's body with both feet on the couch. See CR 61 (Inq. Tr. IV, 109; Inq. Tr. Vol. V, 64-65). A reconstruction of the shooting by a well qualified criminalist establishes that Erdman was turning his body away from Lisoski, in a defensive manner, at the time he was shot. See CR 64 (Murren Aff.).

Erdman Bascomb made a dying declaration after he was mortally shot by Lisoski. He asked the officers, "what's going on?" or "why did you do it?" See CR 61 (Inq. Tr. Vol. V, 63). Moments later, Erdman died.

2. Petitioner Fitzsimons' Policy of Inaction

In 1985, SPD created its first Anti-Crime Team ("ACT I") to provide community-

based enforcement in the South Precinct in Seattle, with its primary emphasis on narcotics-related offenses. ACT I executed numerous search warrants during 1985 and 1986, even though its officers received little or no training regarding the execution of warrants and related topics. See CR 47 (Pillon Aff. at Paras. 8-11). Consistent with SPD's customs and standard practices, ACT I's officers routinely violated the knock and wait rule when executing warrants. See CR 47 (Pillon Aff. at Para. 7).

Recognizing the problems associated with SPD drug raids, the head of ACT I, Sgt. Charles Pillon, wrote a memorandum to his supervisor during April 1986. Sgt. Pillon explained:

> One factor among others troubles me. It is the level of force and violence which now seems to be acceptable in making entries and confronting suspects found in places raided. I know of abuses which have occurred. And

> the inherent danger in utilizing personnel who are not familiar with the subjects to be encountered, rushing about with guns drawn, manhandling people, should be obvious.
>
> . . .
>
> In the face of this then, it seems ill-advised, if not irrational for the police to introduce violence as a tactic. More violence is the likely result when you mix the unstable types who populate the drug scene, firearms, and police from outside the precinct (the Tactical Squad) in these encounters.
>
> In summary it seems cynical as well. A Police Captain, and two members of the Tactical Squad have confided to me that the purpose of these "commando entries" is "practice" for the Tactical Squad and "show" for the neighbors. The community is no place to practice. And "show" is no viable long term tactic.

See CR 94 (Pillon Supp. Aff. at Attachment A). Sgt. Pillon addressed these very same concerns to Petitioner Chief Fitzsimons sometime in 1986. See CR 94 (Pillon Supp. Aff. at Para. 3).

SPD formed a second ACT in the South Precinct in 1987, ACT II. The team did little more than execute narcotics-related search warrants, serving more than 200 warrants during the ten months prior to the shooting of Erdman Bascomb. Almost all warrants were executed during the evening, and many of these were executed during the late evening hours. The officers frequently served many warrants during the same evening.

In most searches, ACT II's officers broke down doors. See CR 62 (Bailey Dep. at 66 (99 percent); Germann Dep. 83-84 ("high 80's, low 90's percentile")). The City provided ACT II with a battering ram to use in this practice. ACT II's officers routinely violated the knock and wait requirement when executing warrants. See CR 47 (Pillon Aff. at Para. 13-14).

During the two weeks prior to the shooting of Erdman, ACT officers were

involved in numerous incidents which showed that warrants were being executed in a reckless fashion. Whether viewed separately or as a whole, these incidents provided notice that remedial action was badly needed.

a. The Shooting of William Tucker

On the evening of February 2, 1988, William Tucker was shot and killed by Michael Henry, an officer with SPD's East Precinct ACT, during the execution of a search warrant. Off. Henry explained:

> As I entered the door I moved quickly to the left in a shuffling motion. I was stepping down with my left leg. As the left leg hit the floor it jarred me and my gun discharged.

See CR 96 (Maybrown Aff. Ex. A, Henry Statement at 2). Tucker, who was unarmed and had been kneeling on the floor, was killed by the officer's bullet. This incident was widely reported in the news media. See CR 47 (Pillon Aff. at Para.

16). After learning of this incident, Fitzsimons stated: "It's a drug war and we're going to continue serving search warrants and going after the people who sell drugs." CR 47 (Pillon Aff. App. A).

b. Letter to the Seattle City Council

On February 4, 1988, two members of a local community organization wrote Seattle City Council members to express concerns regarding the activities of the ACTs. Discussing the Tucker raid, they wrote:

> This was the third police raid on these premises in recent weeks in a manner demanded by Patrick Fitzsimons which clearly places his officers and the public in great jeopardy of injury or death such as this.
>
> The forceful entry in the night-time of these places by police officers may not be in uniform, and the darkness itself, exacerbate the risk for all.
>
> Our major concern is that a more peaceful, civilized and equally effective means of confronting people in these places was articulated and practiced under Romero Yumul's

> direction by South Precinct personnel as indicated in documents we have enclosed. [Chief of Police] Fitzsimons effectively destroyed these strategies by insisting that confrontations be done only by search warrant, or at least in the majority of cases, and thereby led us to a tragedy such as this.

CR 96 (Maybrown Aff. Ex. B at 1). After discussing Sgt. Pillon's April 1986 memo, these citizens articulated very specific concerns regarding the training and supervision of SPD's ACTs:

> Fitzsimons has forced this incredible problem to be the burden of a very few officers in the anti-crime teams. The fatigue, stress, and confusion these few suffer clearly escalate the risks of mistakes such as this. . . . [T]here is a clear pattern of assigning young, inexperienced officers to the very high crime and otherwise sensitive areas of this city. These officers have to rely on one another for direction and back-up, even as they attempt to learn the skills they should obtain from more experienced partners. We have it from good authority, also, that training officers at the Police Academy are very

> concerned about the low level of fire arms expertise that is common to these young officers because of the burden on training officers and the apparent indifference of the Chief.

CR 96 (Maybrown Aff. Ex. B at 2).

c. Seattle Times News Article

On February 7, 1988, the Seattle Times published a front-page news article entitled: "Seattle Police Acknowledge other Shooting Accidents." See CR 46 (Pillon Aff. App. B). This article described two incidents, in addition to the Tucker incident, during which SPD officers improperly discharged their handguns during the execution of narcotics-related search warrants.

The first discharge occurred when ACT II was serving a warrant on the evening of April 7, 1987. See CR 96 (Maybrown Aff. Ex. C). There, the officers who were assigned to force open the door to the apartment hit the screen and solid door

with the ram. As they passed into the apartment, the officers became tangled in a wire from the screen.[3] One officer's firearm inadvertently went off and the bullet just missed the head of a lieutenant who was overseeing the raid.

The second discharge occurred when the East ACT was serving a warrant on the evening of October 17, 1987. See CR 96 (Maybrown Aff. Ex. D). During the search, Off. Landy Black entered a darkened room and fired at a shirt hanging on a curtain rod. Off. Black explained that he thought that the shirt was a suspect lunging at him. See id. Two children were sleeping on a mattress located just next to this shirt. See id.[4]

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[3] The police officers' statements do not indicate that the officers knocked, announced and waited before ramming the door. See CR 96 (Maybrown Aff. Ex. C).

[4] A police department review board concluded that this shooting was justified. One SPD officer, however,

d. KIRO TV Videotape

On February 6, 1988, ACT II brought members of a television news team along to videotape the execution of two search warrants. KIRO TV broadcast a tape of these raids several times during the following days. See CR 47 (Pillon Aff. App. D). The tape very clearly shows the officers breaking down doors to two houses without satisfying the knock and wait

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disagreed with this judgment:

> While I can understand the tension that exists during this type of police activity, the officer's use of his firearm under the described conditions is in my opinion not justified and should be classified as such.
>
> This is the second discharge by Officer Black during a drug raid although circumstances are different in each of the cases. It is also at least the third discharge in the last couple of years under somewhat similar circumstances.

See CR 96 (Maybrown Aff. Ex. D).

requirement. See CR 97 (McBride Supp. Aff. at Para. 16).

During the first taped search, the same officer who became tangled in the screen on April 7, 1987 is seen kicking open the door immediately after he reaches the threshold of the home. There was no knock and no announcement prior to entry. See Miller Dep. at 27-39, 43.

During the second search that evening, Officers Rusness and Murray -- the same officers who forced open the door to the Bascomb Apartment -- are seen hitting the door with the ram immediately upon reaching the threshold of the home. The officers yelled "Seattle Police" contemporaneously with their breaking the door open with the ram. Other than the blow with the ram, the officers did not

knock on the door and request admission. See Miller Dep. at 33-34.[5]

The KIRO tape is strong evidence regarding the routine practices of the ACT officers. Even knowing that these entries had been taped, the officers prepared reports which did not accurately describe the entries. Instead, the officers prepare falsified reports -- including "stock" allegations that were expected to pass muster under the knock and wait requirement. The officers never contended that exigent circumstances existed in either of these raids. See CR 97, 155.

e. Pillon Letter of February 9, 1988

On February 9, 1988, just eight days before the shooting of Erdman Bascomb, the leader of ACT I again warned Chief

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[5] Before approaching the door to execute the second search, the officers are heard joking about their exploits. One officer says "rock and party" and others reply: its "party time."

Fitzsimons that continued drug raids were sure to cause additional bloodshed and urged the chief to view the KIRO TV news report. Sgt. Pillon explained:

> Sunday evening a local T.V. station broadcast coverage of two raids conducted by one of our A.C.T.'s if you have not seen this footage you should A.S.A.P. I am obtaining it from them, and will make it available.
>
> What it portrays is precisely how a well intended program can go wrong, and in the process create danger, and terror for the innocents caught in its path. Officers forced their way into two different homes in the nighttime, amid shouting, and confusion, and immediately found small children, terrified, and confused, in their path. These youngsters finally were forced to the floor, and contained but at incredible risk of injury or death from the officers who were also a threat to themselves. The tragic accidental death of WM. Tucker last week emphasizes this risk beyond any honest argument.
>
> There are those on your staff I am sure who will tell you this is all proper, and necessary -- That search

warrants were in hand, and such work is necessary to deal with the rock house problem. It is just the misfortune of such as those youngsters, or the late WM. Tucker even, to be caught in the middle of what has to be, they will say; regrettable but inevitable. This is a travesty!

. . .

And consider that the frenzy of this activity has brought the few officers on these teams to the point of exhaustion. they are at danger to themselves, and the public as well. Imagine if the young officer who had fired at the shirt in the window some weeks back had killed a youngster fleeing the uproar and confusion so clearly identified in that T.V. footage.

. . .

I urge you to command those who plan, and execute these raids to refrain from such violent entries in such cases, and even to hand them off the patrol force for peaceful intervention as we did. Contact Child Protective Services. They came quickly to our assistance in such cases, and together we enhanced the welfare of these children and their parents as well.

> Please do this for the children. I submit that it is an inherently excessive use of police force to utilize such tactics where children are present. There is not enough dope in the country to justify the harm that is being done. These youngsters can be emotionally scarred for life, and forever distrusting of the police.

CR 46 (Pillon Aff. at App. C).

Chief Fitzsimons admits that he had received Pillon's letter, that he knew about these incidents and that he viewed the videotape, all before the Bascomb shooting. See Fitzsimons Dep. at 18-51. Even so, Fitzsimons took no steps to remedy the constitutional violations which were evidenced by these incidents.

Based upon these facts, respondents' expert rendered an opinion that Fitzsimons' conduct "amounted to deliberate indifference to the rights of the citizens of Seattle, and this failure directly caused the shooting death of

Erdman Bascomb." McBride Supp. Aff. at Para. 18.

B. PROCEDURAL HISTORY

In January 1991, the Bascomb family initiated this wrongful death action against the City of Seattle, Chief Fitzsimons and Officer Lisoski. Among their several claims, the Bascombs allege that Lisoski and Fitzsimons violated the Civil Rights Act, 42 U.S.C. § 1983. They claim that Lisoski used excessive and unreasonable force in seizing Erdman Bascomb. As to Fitzsimons, the Bascombs claim that he failed to adequately train, supervise and discipline his officers and that Fitzsimons' inaction set in motion a series of acts which he should have known would cause ACT officers -- like Lisoski -- to inflict unconstitutional injury.

Lisoski moved for summary judgment on the basis of qualified immunity. Relying upon his own statement of the facts,

Lisoski claimed that those facts did not support a finding that he had violated any clearly established right. Some weeks later, Fitzsimons filed a motion for summary judgment. Fitzsimons filed no memorandum in support of his motion and he did not raise the qualified immunity issue until the filing of his reply brief.

On April 23, 1992, after reviewing extensive briefing and after hearing oral argument, the trial court ruled that Lisoski and Fitzsimons were not immune from suit as to respondents' unreasonable force claim. Noting that there were "factual disputes [which] underlie the reasonableness determination," Petition App. 14, the court held that because plaintiffs had presented substantial evidence that Lisoski's actions were objectively unreasonable, this ultimate issue must be resolved by the jury.

As to Chief Fitzsimons, the court ruled that he had not properly raised the qualified immunity issue. See id. at App. 29. Nevertheless, the court was

> convinced that Chief Fitzsimons is not entitled to such immunity. As discussed above, Erdman Bascomb's constitutional right against use of excessive force was clearly established at the time of his death. As with Officer Lisoski's motion for qualified immunity, the reasonableness of Chief Fitzsimons' actions must be left to the jury.

Id.

The City also moved for summary judgment asking the court to dismiss respondents' municipal liability claims. The court rejected all of the City's arguments, concluding that Fitzsimons' actions, and inactions, constitute policy for the City of Seattle[6] and that the Bascombs had presented ample evidence that

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[6] The City has never disputed this finding. See Petition App. 22.

the City failed to adequately train, supervise and discipline its officers.

Thereafter, the police officers filed an interlocutory appeal in the Ninth Circuit of Appeals. On September 21, 1992, after reviewing the parties' briefing, a panel of the appellate court dismissed the appeal because petitioners' immunity claims were not separable from the disputed factual issues in this case.[7]

III. SUMMARY OF ARGUMENT

Petitioners concede that the trial court applied the proper standard when reviewing their motions for summary judgment of dismissal based upon the

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[7] It is noteworthy that the officers did not file their opening brief in a timely fashion and that this also provided sufficient grounds for dismissal of the appeal. See FRAP 31(c); Circuit Rule 31-2.4. However, because of its resolution of respondents' motion to dismiss, the court did not ultimately rule upon this issue.

qualified immunity defense. Petitioners also concede that the law was clearly established at the time Erdman Bascomb was killed. Viewing the evidence in the light most favorable to the respondents, it is clear that both petitioners violated Erdman's clearly established rights and that the district court properly concluded that petitioners were not entitled to immunity.

In reviewing the district court's decision, the Ninth Circuit found that no "purely legal" question was presented in the appeal. Petitioners did not claim that the law was not clearly established; rather, they present factual denials to respondents' claims. Like all other courts that have addressed such "we didn't do it" claims, the Ninth Circuit correctly dismissed the appeal.

For all these reasons, this is not an appropriate case for this Court to grant certiorari.

IV. ARGUMENT

A. BECAUSE DISPUTED FACTUAL ISSUES EXISTED, THE NINTH CIRCUIT PROPERLY DISMISSED PETITIONERS' INTERLOCUTORY APPEAL.

In Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court held that the denial of a motion to dismiss or for summary judgment based on qualified immunity is a collateral order, appealable under the principles articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In so ruling, the Court emphasized that the qualified immunity inquiry is to

> "permit the resolution of many insubstantial claims on summary judgment" and to avoid "subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are

> alleged to have violated were not clearly established at the time. [Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)].
>
> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell, 472 U.S. at 526 (some citations omitted). See also Anderson v. Creighton, 483 U.S. 635, 646 n.6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

Applying Cohen, the Court ultimately concluded that the issue immediately appealable was the "essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." 472 U.S. at 526

(emphasis added). In so ruling, the Court explained that an appellate court would not be called upon to

> consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law . . .

472 U.S. at 528. Accordingly, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530 (emphasis added).

Based upon Mitchell, the Ninth Circuit has correctly identified certain situations -- cases in which the crucial factual issues are in dispute -- where an appellate court cannot effectively review the qualified immunity question. See Velasquez v. Senko, 813 F.2d 1509 (9th

Cir. 1987). In essence, the Ninth Circuit has concluded that where a genuine factual dispute exists and where defendants could not be entitled to immunity if the plaintiff's version of the facts are correct, the trial court's denial of a motion for summary judgment cannot be immediately appealed. See Velasquez, 813 F.2d at 1511.

The Ninth Circuit's approach is in accord with all other circuit courts which have addressed this question. See, e.g., Cartier v. Lussier, 955 F.2d 841, 844 (2d Cir. 1992); DiMarco v. Rome Hospital, 952 F.2d 661, 665 (2d Cir. 1992); Hurlman v. Rice, 927 F.2d 74, 79 (2d Cir. 1991); Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991); Schrob v. Catterson, 967 F.2d 929, 938-39 (3d Cir. 1992); Lion Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987); Elliot v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991), cert. denied, ___ U.S. ___.

112 S.Ct. 973, 117 L.Ed.2d 138 (1992); Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989); Peppers v. Coates, 887 F.2d 1493, 1497 (11th Cir. 1989)[8]; Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991) cert. denied, ___ U.S. ___, 113 S.Ct. 62, 121 L.Ed.2d 29 (1992).

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[8] In Howell v. Evans, 922 F.2d 712 (11th Cir. 1991), the Eleventh Circuit suggested that an appeal should not be quashed merely because the facts are in dispute, but the Howell decision was subsequently vacated. See 931 F.2d 711.

In Craft v. Wipf, 810 F.2d 170, 173 (8th Cir. 1987) (per curium), the Eight Circuit held that defendants were entitled to appeal from a pretrial order refusing to entertain motions raising the qualified immunity defense. In dicta, the court noted that it is "best to avoid hinging appealability itself on the degree of 'factualness' of the issues." 810 F.2d at 172. No other court has adopted that aspect of the Craft court's opinion. See Elliot, 937 F.2d at 342 (rejecting Craft analysis). Moreover, the Craft court went on to explain that "not all denials of qualified immunity will be immediately appealable, no matter how 'factual' the question." 810 F.2d at 172 (emphasis in original).

The Seventh Circuit's decision in Elliot is instructive on this point. There, Judge Easterbrook wrote:

> Yet the reason a court of appeals examines the facts is to determine whether it was "clearly established" at that time that such deeds were forbidden. It would extend Mitchell well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights. If a general defense on the merits supports interlocutory appeal, then every public defendant is entitled to pretrial appellate decision. Mitchell did not create a general exception to the finality doctrine for public employees.

Elliot, 937 F.2d at 342.

As was readily apparent to the trial court and the appellate court in this case, petitioners' immunity claims are no more than factual denials. Accepting respondents' facts, as the courts must,

the officers had undoubtedly violated Erdman's clearly established rights. No "purely legal" question was presented in the appeal.

Relying upon Velasquez, the Ninth Circuit properly dismissed petitioners' interlocutory appeal. It is certainly not appropriate for an appellate court to resolve disputed factual issues in the guise of a ruling on qualified immunity. Petitioners have presented no legal issues which may be resolved by way of an interlocutory appeal.

Hunter v. Bryant, 502 U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), wherein this Court held that Secret Service agents who had reasonable grounds to believe that a person had threatened the life of the President, does not suggest a different result. There, the undisputed facts established that the agents were entitled to qualified immunity. Here, by contrast,

the officers' immunity claims are based wholly upon disputed facts.

B. THE DISTRICT COURT CORRECTLY DENIED PETITIONERS' IMMUNITY CLAIMS.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." Id. See also Davis v. Scherer, 468 U.S. 183, 191-94, 104 S.Ct. 3012, 82 L.Ed.2d 919 (1984).

Presenting an extraordinarily slanted description of the "facts" in this case, petitioners now ask this Court to review the qualified immunity issue. Upon this

record, however, no court could conclude that either officer is entitled to immunity; and certainly no court could do so if it resolved all factual disputes in favor of the respondents, as it must when evaluating a motion for summary judgment.[9]

1. The officers violated clearly established rights.

The Bascombs allege a violation of rights which were clearly established at the time of the shooting. First, in the seminal case of Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Court concluded that the use of deadly force to apprehend a fleeing suspect who was neither armed nor otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest.

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[9] Petitioners concede that this is the correct standard. See Petition at i (question presented 2) and 16.

In Garner, the Court commenced its analysis by noting that the "intrusiveness of a seizure by means of deadly force is unmatched" and that the use of deadly force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." 471 U.S. at 9. In light of these fundamental principles, the Court concluded that a "police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471 U.S. at 11. The Court also held that, even in situations where the suspect threatens the officer with a weapon, deadly force may be used only after some warning is given if feasible. See 471 U.S. at 11-12.

Since Garner, countless courts have applied the Fourth Amendment's "objective reasonableness" standard to situations where an officer uses deadly force. See, e.g., Curnow v. Ridgecrest Police, 952

F.2d 321 (9th Cir. 1991) cert. denied, ___ U.S. ___, 113 S.Ct. 460, 121 L.Ed.2d 369 (1992); Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987), cert. denied, 484 U.S. 936, 108 S.Ct. 311, 98 L.Ed.2d 269 (1988); Davis v. Little, 851 F.2d 605 (2d Cir. 1988).[10] See also Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989); Reed v. Hoy, 891 F.2d 1421 (9th Cir. 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 2087, 115 L.Ed.2d 1053 (1990); Fargo v. City of San Juan Bautista, 857 F.2d 638, 641 (9th Cir. 1988). Similarly, every person has the right not to be subjected to unreasonable or excessive

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[10] In fact, on January 3, 1986 and March 28, 1986, SPD's attorneys distributed bulletins which informed all police officers that they might be held liable if they acted unreasonably in using deadly force. See CR 60 (Att. A). Quoting extensively from Garner, the bulletins explained that "the Court specifically requires some warning, if feasible, prior to the use of deadly force." Id. No warning was given in this case.

force by a police officer. See, e.g., Graham v. Connor, 490 U.S. 386, 109 S.Ct. 54, 102 L.Ed.2d 32 (1989); Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992).

Second, Fourth Amendment jurisprudence has long recognized the right to be free from unreasonable searches, see, e.g., Terry v. Ohio, 392 U.S. 1, 22-27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Ker v. California, 374 U.S. 23, 33, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), and it has long been settled that searches and seizures conducted in violation of the Fourth Amendment are actionable under the Civil Rights Act. See, e.g., Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

When executing a search warrant, the Fourth Amendment requires that public officers knock, announce their presence

and wait a reasonable period of time before entering a person's home. See, e.g., Ker v. California, 374 U.S. at 40-41; United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir. 1973), cert. denied, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974); Rivera v. United States, 928 F.2d 592 (2d Cir. 1991); U.S. v. Mapp, 476 F.2d 67, 75 (2d Cir. 1973); State v. Coyle, 95 Wash. 2d 1, 621 P.2d 1256 (1980); State v. Edwards, 20 Wash. App. 648, 581 P.2d 154 (1978). The knock and wait rule "is deeply rooted in our heritage" and codifies

> a tradition embedded in Anglo-American law . . . [declaring] the reverence of the law for the individual's right to privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Miller v. U.S., 357 U.S. 301, 313, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958).

Moreover, the rule is not a technical road block to police action, but addresses important practical concerns:

> Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful homeowner.

Id.[11]

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[11] One Washington court has explained:

> The purpose of the general rule is to ensure that an individual's right to privacy within his home will not be arbitrarily violated. An individual should be given an opportunity to be apprised of an officer's authority, of his purpose, and be permitted a reasonable opportunity to voluntarily admit the officer into his home. An equally important purpose for the rule is to protect the officer himself. The unannounced breaking and entering of a private dwelling could easily lead an individual to believe his safety, and that of his family, was in peril, causing him to take violent defensive measures which he otherwise would not have taken had he known a warrant had been issued to search his home. This is

The Washington knock and announce statute, RCW 10.31.040, permits an officer to break into a house to execute a search or arrest warrant "if, after notice of his office and purpose, he be refused admittance."[12] This statute was enacted in 1881, and was based upon an earlier 1854 law. Cases substantially predating the 1988 killing make it clear that the rule is grounded upon the Fourth and Fourteenth Amendments of the United States Constitution. See, e.g., Coyle, 95 Wash. 2d at 5-9.

> particularly true when the officers are not in uniform.

State v. Edwards, 20 Wash. App. 648, 652, 581 P.2d 154 (1978) (quoting State v. Lowrie, 12 Wash. App. 155, 157, 528 P.2d 1010 (1974)) (emphasis in original).

[12] The Washington rule is substantially identical to 18 U.S.C. § 3109, which permits government agents to break into a house or building only "if, after notice of his authority and purpose, he is refused admittance."

Violation of the knock and wait rule will make out a violation under Section 1983. See, e.g., Rivera, 928 F.2d 592. Whether the police actually complied with the requirement, or whether exigent circumstances existed to excuse compliance, is a "fact specific" issue where a court "is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." Rivera, 928 F.2d at 607.

Consistent with these explicit authorities, the trial court correctly found that the law was clearly established at the time Erdman was killed. See Petition App. 8-10. In point of fact, the officers did not suggest otherwise in their arguments below, but instead claimed that respondents had asserted these constitutional rights in an overly broad manner. See id. at 9. This contention

was rejected by the trial court. See id. at 10.

In their petition for certiorari to this Court, the officers do not argue that the law was not clearly established. In conceding the controlling question from Mitchell and its progeny, there can be no claim that their appeal was improperly dismissed. As explained by Judge Easterbrook:

> When rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is precisely the question for trial.

Elliot, 937 F.2d at 341. Petitioners' immunity claims are no different than "we didn't do it" claims which have been dismissed by every appellate court which has addressed such claims. See, e.g.,

Schrob, 967 F.2d at 939; Elliot, 937 F.2d at 342; Velasquez, 813 F.2d at 1511.

2. The District Court properly concluded that the officers were not immune.

Petitioners acknowledge that the trial court utilized the correct standard by "viewing the evidence in the light most favorable to the respondents . . ." Petition at i, 16. However, the petitioners go on to offer an utterly disingenuous description of the facts in this case. Viewed through the proper evidentiary prism, it is clear that both petitioners violated Erdman's clearly established rights, and that qualified immunity was properly denied. See Curnow, 925 F.2d at 325.

Taking the evidence most favorably to the respondents, the facts regarding the incident are as follows:

1. There were no exigent circumstances which would excuse

compliance with the knock and wait rule.

2. The officers did not knock, announce or wait prior to smashing through the Apartment door.

3. The ACT officers forced open doors 99 % of the time they were executing warrants.

4. At the time of the entry, Erdman was lying on a couch, watching television. Erdman was unarmed and helpless; he posed no threat to the ACT officers.

5. Lisoski shot Erdman less than one second after he entered the Apartment. Lisoski fired his weapon so quickly that he could not see anything about the person he shot. He could not see the person's face or eyes. He could not tell if he was firing at a man or a woman. And, he could not determine the color or race of the person that he shot.

6. Lisoski provided no warning before shooting and killing Erdman.

7. Based upon a review of the path of the bullet through Erdman's body as determined at the autopsy and Lisoski's position when he fired his weapon, a criminalist determined that it would have been impossible for Bascomb to have

been turning towards Lisoski, as Lisoski claimed, because this would have resulted in a substantially different angle of the entry wound. Rather, Bascomb was turning his body away from Lisoski at the time he was shot. See CR 64 (Murren Aff. at 3-4).

8. Lisoski did not have probable cause to believe Erdman had committed any crime involving infliction of harm. Neither firearms nor controlled substances were found in the Apartment.

9. After being mortally wounded, Bascomb asked the officers "what's going on?" or "why did you do it?"

10. The officers knew that the room they were entering was dark, but they did not use their flashlights.

11. Before Erdman was killed, Chief Fitzsimons knew that the ACT officers routinely violated the knock and wait rule and that the officers were badly in need of firearm training. Although Fitzsimons had both actual and constructive knowledge of the ACT's unconstitutional customs and policies, he chose to take no remedial action.

When deciding a motion for summary judgment, the court may not make

credibility determinations nor may the court weigh any of the evidence. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Viewing all the "justifiable inferences" in favor of the respondents, the following is established:

1. Bascomb did not point the TV channel changer, or anything else, at Lisoski.

(a) Such an act is illogical and unbelievable;

(b) Rather than turning towards Lisoski, as the officer claimed, Erdman was turning his body away from Lisoski, which would have been a defensive or frightened type of response;

(c) There was nothing in this Apartment that Erdman needed to protect; and

(d) Erdman did not have sufficient time to take such action.

2. Erdman was not stepping off the couch and placing his leg on the floor, as Lisoski claimed, because witnesses remember seeing both of Erdman's legs on the couch almost immediately after he was shot.

3. Erdman's dying declaration established that he did not know why he was shot, thereby contradicting Lisoski's claim that Erdman had made some threatening gesture.

4. Lisoski knew that the two officers handling the ram did not, and would not, comply with the knock and wait rule.

5. In entering a residence at 11:45 p.m., without knocking and waiting, Lisoski knew that he might encounter residents who would either not know what was happening, or might mistakenly believe that they were being burgled, thereby creating a great danger to the officers and residents.

6. If the ACT officers had knocked and waited before ramming the Apartment door, Erdman would have come to the door and Erdman would not have been killed.

7. If Chief Fitzsimons had properly trained, supervised and disciplined his officers, Erdman would not have been killed.

The qualified immunity enjoyed by police officers protects them against a suit for damages where the undisputed evidence shows that the officers "acted reasonably under settled law in the circumstances." Hunter, 502 U.S. at ___, 112 S.Ct. at 537 (emphasis added). While this inquiry requires the court to view the objective facts from the perspective of the officers claiming immunity, the court is not required to accept the facts as presented by the officers. Here, a genuine factual dispute exists as to "the circumstances" surrounding Erdman's death.

Respondents have presented compelling evidence, not only direct, but also circumstantial, which defeats Lisoski's self-serving claims. As Abraham Lincoln so eloquently explained, circumstantial evidence is often more valuable than direct evidence:

> We better know there is fire whence we see much spoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.

See, e.g., Hopkins v. Andaya, 958 F.2d 881, 888 (9th Cir. 1992) (quoting Abraham Lincoln).

Ignoring all of the evils which have been disclosed to the lower courts, petitioners continue to claim that "Fitzsimons was not personally involved in any way with the use of force against Erdman Bascomb." Petition at 24. This claim is plainly silly. See CR 47, 94 (affidavits of Charles Pillon); CR 97 (supplemental affidavit of Robert McBride); and CR 93. Based upon the events during the weeks preceding Erdman's death -- the shooting of William Tucker, the KIRO videotape, the Seattle Times news article, the letter from Sgt. Pillon -- Fitzsimons had every reason to believe

that his officers would violate the rights of citizens like Erdman Bascomb. Nonetheless, Fitzsimons chose to do nothing to rectify the situation.[13]

C. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THESE INTERLOCUTORY ORDERS.

This Court has long recognized that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals and appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372, 384, 13 S.Ct. 758, 37 L.Ed.2d 486 (1893) (emphasis added). See also Hamilton-

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[13] The irony of Fitzsimons' present claims should not be lost on this Court. Just as Fitzsimons was deliberately indifferent to the rights of Erdman Bascomb, petitioners continue to ignore all of the evidence which establishes his indifference.

Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed.2d 629 (1916); Justice William Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230, 231-232 (1983). Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial. See, e.g., Urie v. Thompson, 337 U.S. 163, 172-73, 69 S.Ct. 1018, 93 L.Ed.2d 1282 (1949); Reece v. Georgia, 350 U.S. 85, 87, 76 S.Ct. 167, 100 L.Ed.2d 77 (1955); Washington v. Fishing Vessel Assn., 443 U.S. 658, 672 n.19, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

When analyzing petitioners' claims, this Court must recognize that the trial court's denial of the motions for summary

judgment grounded in qualified immunity does not preclude a finding of qualified immunity at trial. See, e.g., Vaughan v. Ricketts, 950 F.2d 1464, 1468 (9th Cir. 1991).

Because petitioners will have an opportunity to raise the qualified immunity issue once the facts have been presented at trial, this Court should not invoke its certiorari jurisdiction at this time.

V. CONCLUSION

For all of these reasons, petitioners' request for certiorari must be denied.

DATED this 16th day of March, 1993.

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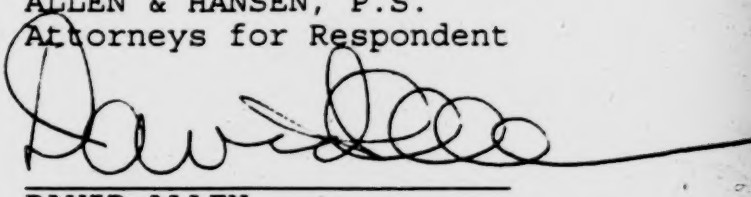

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